

SERVICE DATE – NOVEMBER 14, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34554 (Sub-No. 17)

UNION PACIFIC RAILROAD COMPANY—TEMPORARY TRACKAGE RIGHTS
EXEMPTION—BNSF RAILWAY COMPANY

Digest:¹ This decision authorizes the expiration of certain Board approved rights by one carrier to operate over the lines of another carrier, even though such rights typically continue indefinitely.

Decided: November 8, 2012

By petition filed on August 16, 2012, Union Pacific Railroad Company (UP) requests that the Board partially revoke the class exemption to permit the modified trackage rights arrangement exempted in Docket No. FD 34554 (Sub-No. 16)² to expire on or about December 31, 2012.³

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In that docket, on August 16, 2012, UP filed a verified notice of exemption under the Board's class exemption procedures at 49 C.F.R. § 1180.2(d)(7). The notice covered the agreement by BNSF Railway Company (BNSF) to extend to December 31, 2012, the expiration date of the local trackage rights granted to UP over BNSF's line of railroad between BNSF mileposts 579.3 near Mill Creek, Okla., and 631.1 near Joe Junction, Tex., a distance of approximately 51 miles. UP submits that, while the trackage rights are only temporary rights, because they are "local" rather than "overhead" rights, they do not qualify for the Board's class exemption for temporary trackage rights under 49 C.F.R. § 1180.2(d)(8). See Union Pac. R.R.—Temporary Trackage Rights Exemption—BNSF Ry., FD 34554 (Sub-No. 16) (STB served Aug. 31, 2012).

³ The trackage rights were originally granted in Union Pacific Railroad Company—Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company, FD 34554 (STB served Oct. 7, 2004). Subsequently, the parties filed several notices of exemption based on their agreements to extend expiration dates of the same trackage rights. See FD 34554 (Sub-No. 2) (STB served Feb. 11, 2005); FD 34554 (Sub-No. 4) (STB served Mar. 3, 2006); FD 34554 (Sub-No. 6) (STB served Jan. 12, 2007); FD 34554 (Sub-No. 8) (STB served Jan. 4, 2008); FD 34554 (Sub-No.10) (STB served Jan. 8, 2009); FD 34554 (Sub-No. 12) (STB served Dec. 31, 2009); and FD 34554 (Sub-No. 14) (STB served Feb. 11, 2011). Because
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UP states that the modified trackage rights arrangement exempted in Docket No. FD 34554 (Sub-No. 16) is necessary to continue to permit UP to move loaded and empty ballast trains for use in its maintenance-of-way (MOW) projects. But UP is only seeking, and BNSF is only willing to grant, temporary operating rights over BNSF's trackage until December 31, 2012.

DISCUSSION AND CONCLUSION

Although UP and BNSF have expressly agreed on the duration of the proposed temporary trackage rights arrangement, trackage rights approved under the class exemption at 49 C.F.R. § 1180.2(d)(7) typically remain effective indefinitely, regardless of any contract provisions. Occasionally, trackage rights exemptions have been granted for a limited time period rather than in perpetuity. See Union Pac. R.R.—Trackage Rights Exemption—The Burlington N. and Santa Fe Ry., FD 34242 (Sub-No. 1) (STB served Oct. 7, 2002).

Under 49 U.S.C. § 10502, the Board may exempt a person, class of persons, or a transaction or service, in whole or in part, when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either the transaction or service is of limited scope, or regulation is not necessary to protect shippers from the abuse of market power.

UP's temporary trackage rights were already authorized under the class exemption at 49 C.F.R. § 1180.2(d)(7). See R.R. Consolidation Procedures—Trackage Rights Exemption, 1 I.C.C.2d 270 (1985). Granting partial revocation in these circumstances will promote the rail transportation policy by eliminating the need to file a second pleading seeking discontinuance when the agreements expire, thereby promoting rail transportation policy goals at 49 U.S.C. § 10101(2), (4), (5), (7) and (15). Moreover, limiting the term of the trackage rights is consistent with the limited scope of the transaction previously exempted, and will have no adverse impact

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the original and subsequent trackage rights notices were filed under the class exemption at 49 C.F.R. § 1180.2(d)(7), under which trackage rights normally remain effective indefinitely, in each instance the Board granted partial revocation of the class exemption to permit the authorized trackage rights to expire. See FD 34554 (Sub-No. 1) (STB served Nov. 24, 2004); FD 34554 (Sub-No. 3) (STB served Mar. 25, 2005); FD 34554 (Sub-No. 5) (STB served Mar. 23, 2006); FD 34554 (Sub-No. 7) (STB served Mar. 13, 2007); FD 34554 (Sub-No. 9) (STB served Mar. 20, 2008); FD 34554 (Sub-No. 11) (STB served Mar. 11, 2009); FD 34554 (Sub-No. 13) (STB served Mar. 15, 2010); and FD 34554 (Sub-No. 15) (STB served Apr. 15, 2011). At the time of the extension authorized in Docket No. FD 34554 (Sub-No. 14), the parties anticipated that the authority to allow the rights to expire would be exercised by December 18, 2011. On August 16, 2012, in Docket No. FD 34554 (Sub-No. 16), UP filed its most recent notice of exemption seeking Board authority for temporary trackage rights covering the parties' latest agreement—September 15, 2012 to December 31, 2012. In Docket No. FD 34554 (Sub-No. 17), UP filed a petition to partially revoke the class exemption to permit expiration of those trackage rights, which we are addressing here.

on shippers on the line because the trackage rights that are the subject of the exemption are solely for the continued movement of loaded and empty ballast trains for use in UP's MOW projects. Therefore, we will grant the petition and permit the trackage rights exempted in Docket No. FD 34554 (Sub-No. 16) to expire on or about December 31, 2012.

In order to provide the statutorily mandated protection to any employee adversely affected by the discontinuance of trackage rights, we will impose the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for partial revocation is granted.
2. Under 49 U.S.C. § 10502, the trackage rights described in Docket No. FD 34554 (Sub-No. 16) are exempted, as discussed above, to permit the trackage rights to expire on or about December 31, 2012, subject to the employee protective conditions set forth in Oregon Short Line, 360 I.C.C. 91 (1979).
3. Notice will be published in the Federal Register on November 14, 2012.
4. This decision is effective on December 14, 2012. Petitions to stay must be filed by November 26, 2012. Petitions for reconsideration must be filed by December 4, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.